JOSEPH TIE ING HENG

v.

HSBC FINANCE (MALAYSIA) BHD

HIGH COURT SABAH & SARAWAK, KUCHING
IAN HC CHIN J
[CIVIL APPEAL NO: 12-04-98-1]
10 AUGUST 1998

CIVIL PROCEDURE: *Costs - Order as to costs - Appeal - Order by lower court that each party bear own cost upon withdrawal of action - Whether appellant should be awarded costs - Whether there was misconduct on part of appellant - Whether appellant entitled as of right to costs - Subordinate Courts Rules 1980, O. 48 r. 10(1) - Whether respondent showed circumstances justifying otherwise*

This was an appeal by the appellant against the order as to costs by the Sessions Judge.

In the lower court, the respondent had added the appellant as the 3rd defendant in the suit as a result of the defences put up by the 1st and 2nd defendants therein. However, the parties reached a settlement without having to go to trial. The Session Judge allowed the respondent to withdraw the said suit with an order that each party bear its own cost. The appellant argued that costs should have been awarded to him. Hence, the appeal.

Against awarding costs for the appellant, the respondent argued that as the other two defendants had alleged misconduct on the part of the appellant, it was left with no choice but to join the appellant as 3rd defendant so that all issues could be resolved. Further, the appellant had not assisted the original parties to the suit in reaching the settlement.

Held:

[1] There was no suggestion that the appellant was guilty of any misconduct. Further, in the absence of any legal duty on the part of the appellant to assist the parties to reach a settlement, this omission could not be treated as misconduct.

[2] A withdrawal of an action by a plaintiff under O. 16 r. 2(1) of the Subordinate Courts Rules 1980 would entitle a defendant as of right to costs under O. 48 r. 10(1) without the necessity of an order of the court for the same. Therefore, it is for a plaintiff to displace that general rule

by showing circumstances that move the court to exercise its discretion not to allow costs when a plaintiff applies to the court for leave to discontinue or withdraw without having to pay costs. In this instance, the respondent had not been able to show any circumstance or factor as justifying the deprivation of costs to which the appellant would have been entitled.

[Costs for the appellant.]

Case(s) referred to:

Hongkong & Shanghai Banking Corp v. Timor Electric Cable & Wire & Bhd & Ors [1991] 3 CLJ 1794 ***(dist)***

JT Stratfor & Son Ltd v. Lindley & Ors (No 2) [1969] 1 WLR 1547 ***(cit)***

Kerajaan Negeri Johore & Anor v. Adong bin Kuwau & Ors [1998] 2 CLJ 665 ***(cit)***

Mohamed bin Hussin & Anor v. Hashim bin Said [1978] 1 MLJ 127 ***(cit)***

Petroleum Nasional Bhd (Petronas) & Anor v. Cheah Kam Chiew [1987] 1 MLJ 25 ***(cit)***

Tan Kim Hai and Sons Enterprises Sdn Bhd & Ors v. Tan Kim San and Sons Sdn Bhd & Ors [1996] 5 MLJ 592 ***(cit)***

Legislation referred to:

Government Proceedings Ordinance, s. 14

Subordinate Courts Rules 1980, O. 16, O. 16 r. 2(1), (2), (3), (4), O. 16 r. 3(1), (2), O. 48 r. 10(1)

Other source(s) referred to:

The White Book, 1965, vol 1, p 475

For the appellant - KC Wong; M/s KC Wong & Assoc

For the respondent - Stanley Eddy; M/s Battenberg & Talma

Reported by Sherin Kunhibava & Usha Thiagarajah

JUDGMENT

Ian HC Chin J:

Introduction

This is an appeal by Joseph Tie Ing Heng ('the appellant') against the decision of the Sessions Court handed down on 26 February 1998. The appellant was the 3rd defendant in the lower court suit and HSBC Finance (M) Bhd ('the respondent') was the plaintiff. The respondent applied and was allowed to withdraw the suit with an order by the Sessions Court, made at the instance of the respondent, that each party is to bear its own costs. The parties have agreed that the decision in this case will bind six other appeals involving the

two parties herein, and they are in respect of the following cases, *viz*., Summons No. (1) SC/KG.138/9/II, (2) No. SC/KG.144/92/II, (3) No. SC/KG.126/92/II, (4) No. SC/KG.132/92/II, (5) No. SC/KG.140/92/II and (6) No. SC/KG.142/92/II.

Facts Of The Case

The respondent initially issued a summons against the 1st and 2nd defendants (the two defendants). The respondent provided a housing loan to the two defendants to be repaid by monthly instalments. As security a memorandum of charge in escrow was executed. The two defendants failed to repay the loan and hence the summons against them. The respondent subsequently, after leave of the court was obtained, joined the appellant as the 3rd defendant in the action and the claim of the respondent against the 3rd defendant was that he was in breach of contractual obligations to the respondent and was guilty of negligence in failing to ensure that the respondent had a first registered charge against the property which the respondent was financing the two defendants to purchase. On 19 October 1993 the appellant took out an application to set aside the joinder. No defence had yet been delivered by the appellant. At the hearing of this application, the Sessions Court dismissed the respondent's preliminary objection. The respondent also failed in an appeal against that decision to the High Court. The High Court when dismissing the appeal also gave the view that the leave to add the appellant as a defendant should not have been granted. A further appeal against the decision of the High Court was contemplated when the respondent attempted to obtain leave to appeal to the Court of Appeal but failed. The respondent thereafter withdrew the summons against all the defendants after the plaintiff and the two defendants were able to redeem the master charge and they agreed to the withdrawal of the summons with no order as to costs. The respondent then applied to withdraw the summons against the appellant with no order as to costs but the appellant argued that costs should be awarded to him. The Sessions Court after hearing argument made an order that each party is to bear its own costs giving the following reason for so ordering:

> The first reasons for so doing is that the plaintiff had no choice but to include the 3rd defendant as a party in view of the defences put up by the 1st and 2nd defendant. Further the case is settled without going to trial. There is also information from the court records that the case is settled among the parties.

Grounds For Not Awarding Costs

Mr. Stanley Eddy, learned counsel for the respondent, had argued that there should be no costs on the following grounds, *viz*., (1) the respondent was left with no choice but to join the appellant as a result of the defence of the two

defendants that the appellant was negligent in his conduct as a solicitor so that all matters of controversy can be tried and (2) the respondent when settling the action with the two defendants had expended considerable expense to redeem the master charge and the appellant did not assist at all. The law will now be examined to determine whether the factors mentioned allowed the Sessions Court to exercise its discretion not to award costs to the appellant.

Legal Principles

Before considering the legal principles, it must first be ascertained at what stage the legal proceedings were before the case was withdrawn and under what rules of the court it was withdrawn. Since "withdrawal" is the term used, O. 16 of the Subordinate Courts Rules 1980 would govern the situation. That order deals with discontinuance or withdrawal in two circumstances, (1) without leave and (2) with leave. The relevant rules of O. 16 are reproduced here:

> 2.(1) The plaintiff in an action may, without the leave of the Court, discontinue the action, or withdraw any particular claim made by him therein, as against any or all of the defendants at any time not later than 7 days after service of the defence on him or, if there are two or more defendants, of the defence last served, by serving a notice in Form 40 to that effect on the defendant concerned.
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> (2) A defendant may, without the leave of the Court –
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> (a) withdraw his defence or any part of it at any time;
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> (b) discontinue a counterclaim, or withdraw any particular claim made by him therein, as against any or all of the parties against whom it is made, at any time not later than 7 days after service on him of a defence to counterclaim or, if the counterclaim is made against two or more parties, of the defence to counterclaim last served
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> by serving a notice in Form 40 to that effect on the plaintiff or other party concerned.
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> (3) Where there are two or more defendants to an action not all of whom serve a defence on the plaintiff, and the period fixed by or under these rules for service by any of those defendants of his defence expires after the latest date on which any other defendant serves his defence, paragraph (1) shall have effect as if the reference therein to the service of the defence last served were a reference to the expiration of that period.

This paragraph shall apply in relation to a counterclaim as it applies in relation to an action with the substitution for references to a defence, to the plaintiff and to paragraph (1), of references to a defence to counterclaim, to the defendant and to paragraph (2) respectively.

(4) If all the parties to an action consent, the action may be withdrawn without the leave of the Court at any time before trial by producing to the Registrar a written consent to the action being withdrawn signed by all the parties.

3. (1) Except as provided by rule 2, a party may not discontinue an action or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.

(2) An application for the grant of leave under this rule must be made by notice.

Thus, under r. 2, the respondent was entitled to withdraw the action against the appellant without the leave of the court by serving the prescribed Form 40 since no defence had yet been filed by the appellant. Therefore, this is the position that governs the case, that is the case could be withdrawn without the leave of the court. It follows that the legal principles to be considered are those that govern a situation where a case had been withdrawn without the leave of the court. This brings me to the question of whether costs can be claimed by the appellant if the case had been withdrawn by the serving of a Form 40 notice. Such an event is governed by O. 48 r. 10(1) which says:

10.(1) Where a plaintiff by notice in writing and without leave either wholly discontinues his action against any defendant or withdraws any particular claim made by him therein against any defendant, the defendant may subject to the rules in this Order, be entitled to his costs of the action or his costs occasioned by the matter withdrawn, as the case may be, and, if the costs are not paid within 7 days after the filing of the notice, may sign judgment for them.

The side note of this rule says: "When a party may sign judgment for costs without an order." Therefore, under this provision, a defendant can have his costs as of right. Notwithstanding that provision, it appears that the plaintiff may still apply to and obtain from the court leave to discontinue or withdraw without paying costs (*The White Book*, 1965, vol. 1, p. 475). However, when

such an application is made, the court must, in my view, bear in mind the fact that if not for the application the defendant would have been entitled to costs. Therefore, for this purpose the appellant can be regarded a successful litigant. This brings to play the general principle that costs follow the event and a successful party is entitled to be paid his costs except when it appears to the court that in the circumstances of the case some other order should be made (*Petroleum Nasional Bhd (Petronas) & Anor v. Cheah Kam Chiew* [1987] 1 MLJ 25).

One such circumstance is where the successful litigant has misconducted himself in such a fashion and to such a degree that he ought not to have his costs (see *Kerajaan Negeri Johore & Anor. v. Adong bin Kuwau & Ors.* [1998] 2 MLJ 158 CA). One example where a successful defendant was deprived of his costs because of misconduct is the case of *Mohamed bin Hussin & Anor v. Hashim bin Said* [1978] 1 MLJ 127. In that case the successful defendant was the Government of Malaysia and the plaintiff was an armed forces personnel who was involved in an accident while in a vehicle belonging to the defendant. The defendant did not certify under s. 14 of the Government Proceedings Ordinance whether the plaintiff would be eligible for service compensation until after the plaintiff filed his suit. Thereafter, the plaintiff applied to withdraw the suit and the High Court ordered that costs be awarded to the plaintiff instead of the defendant. The decision was upheld by the Federal Court where Chang Min Tat FJ said:

> It must be borne in mind that the respondent sustained his serious injuries in August 1973. If he had to resort to action in 1975, it must mean only one thing: that Government had until action was started, not only failed to pay him any compensation but also failed to arrive at any decision to do so, or to advise him of any likelihood of his being paid.
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> With respect, I agree therefore with the learned judge that the action of the Government is unreasonable. It was in my view "conduct which induced the plaintiff to bring the action, and without which it would probably not have been brought" within the meaning of conduct justifying depriving a successful defendant of his costs, as defined by Lord Sterndale MR in *Ritter v. Godfrey* [1919] 2 KB 47 and approved by Lord Atkinson in his speech in *Donald Campbell & Cov Pollack* [1927] AC 732 at page 815. It was conduct which fully justified the exercise of the judge's discretion in favour of the respondent.

In the instant case there is no suggestion that the appellant is guilty of any misconduct. Mr. Stanley Eddy told the court that the original parties to the suit had reached a settlement with no help from the appellant. In the absence of any legal duty on the part of the appellant to assist the parties to reach a settlement, I fail to see how this omission can be treated as misconduct.

Mr. Stanley Eddy also submitted that the two defendants in their defence had alleged solicitor's negligence on the part of the appellant and this obliged them to file an application to add the appellant as the 3rd defendant so that all issues could be resolved. This course was ill-advised and this was the view, as mentioned earlier, taken by the High Court judge. The respondent, having taken a wrong course now argues that the appellant should be visited with the argument that the appellant should pay for it by being deprived of his costs. It is so absurd that it needs only to be stated to be put down.

Mr. Stanley Eddy had relied on various cases for his arguments but all those cases were of different facts and circumstances from that of the present case. The first is *Hongkong & Shanghai Banking Corp v. Timor Electric Cable & Wire & Bhd & Ors* [1992] 1 MLJ 779. That case involved a plaintiff suing a borrower and six guarantors for a certain sum. Judgment was on 4 May 1989 obtained against the borrower and one of the guarantors. On 8 June, the plaintiff took out an application to strike out the defence and to enter judgment against another guarantor who was the fifth defendant. Meanwhile the judgment sum was satisfied on 15 August. On 14 October the action was discontinued against all other guarantors except the fifth defendant who later on 21 March 1990 took out an application to have the action against him struck out. The plaintiff subsequently on 4 September took out an application for leave to discontinue the action and for costs against the fifth defendant. All three applications were heard together. The plaintiff's application for striking out was struck out with no order as to costs after the learned judge declined to go into the merit though urged by counsel for the fifth defendant, relying on *JT Stratfor & Son Ltd v. Lindley & Ors (No. 2)* [1969] 1 WLR 1547 which was a case that had gone to sleep for more than three years and where an application for striking out by the defendant was met with an application for leave to withdraw and it was found as a fact that neither side wished to continue with the action. Leave was granted to withdraw with each side to bear its own cost and the merit of the case was not gone into as the court declined to consider the striking out application. The learned judge in *Hongkong & Shanghai Banking Corp v. Timor Electric Cable & Wire & Bhd & Ors* took a similar course. In the present case, there was a pending application of the appellant to have the order that joined him as a defendant struck out and the High Court judge had given the view that the joinder was improper. There is also the additional factor that the respondent would have to pay costs had they discontinued without leave which they were entitled to do so. These circumstances set this case apart from *Hongkong & Shanghai Banking Corp v. Timor Electric Cable & Wire & Bhd & Ors*.

The second case relied on by Mr. Stanley Eddy is *Tan Kim Hai and Sons Enterprises Sdn Bhd & Ors v. Tan Kim San and Sons Sdn Bhd & Ors* [1996] 5 MLJ 592. That case involved several actions between rival factions of a family. Some of the actions resulted in a consent judgment with costs which rendered the action which the plaintiff wanted to discontinue academic because whatever was sought in the action had been achieved by the consent judgment. It was thus that the discontinuance was allowed without costs. However, I would respectfully disagree with the learned judge there when he held that "it is not the law that a plaintiff who withdraws an action must as a matter of course pay the costs of the action". This is what the learned judged actually said, at p. 599:

> Harking back to the legal position, I am of the view that it is not the law that a plaintiff who withdraws an action must as a matter of course pay the costs of the action. Indeed, the principle is that the court must assess the situation to see why the action was withdrawn. In *Barretts & Bird (Wholesale) Ltd v. IPCS* (1988) NLJ 357, Henry J observed as follows at p 358:
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> > Now in most cases of discontinuance that may well be the general rule because in most cases of discontinuance, the discontinuance is effectively a defeat or an acknowledgement of defeat or a likely defeat. But it is equally possible, and the plaintiffs assert it to be the situation in this case, that discontinuance reflects not defeat so much as that the matter has now become academic save for the question of costs. In those circumstances where the matter is effectively academic, the court should then look at the matter to see whether the general rule applies because I am satisfied that the general rule should only apply when the discontinuance can safely be equated with defeat or an acknowledgement of likely defeat

It is obvious from the passage that the learned judge cited that as a general rule costs would be awarded if there is a discontinuance of the action. I also respectfully disagree with the learned judge because, as I have said earlier, a withdrawal of an action by a plaintiff under the provision of O. 16 r. 2(1) would entitle a defendant as of right to costs under O. 48 r. 10(1) without the necessity of an order of the court for the same. Therefore, it is for a plaintiff to displace that general rule by showing circumstances that move the court to exercise its discretion not to allow costs when a plaintiff applied to the court for leave to discontinue or withdraw without having to pay costs.

In the present case, the respondent, for the reasons I have stated, had not been able to show any circumstance or factor as justifying the deprivation of costs to which the appellant would have been entitled.

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Conclusion

Therefore, the learned Sessions Court Judge had erred when she did not allow costs to the appellant. Her order is set aside and in its place an order for costs is made. The appellant is also entitled to costs both here and below. This judgment, because the parties have agreed, applies to the other six cases which I mentioned earlier.

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